Editor's note: 79 I.D. 682

UNITED STATES

v.

E. ROY GRIGG

IBLA 71-272 Decided December 8, 1972

Appeal from decision of Administrative Law Judge Dent D. Dalby (Montana 1818) declaring five mining claims invalid for lack of a discovery.

Affirmed.

Mining Claims: Contests -- Mining Claims: Discovery: Generally

The Government may initiate a contest to determine the validity of mining claims. Its delay in bringing a contest after a mineral patent application has been filed cannot serve as a substitute for a discovery by the applicant necessary to validate a claim, nor does the applicant's holding the claims for many years prior to the filing of the application obviate the necessity of evidence of a discovery.

Mining Claims: Contests -- Notice

Failure of a mineral examiner to notify a claimant of a field examination is not a sufficient reason in a subsequent contest against mining claims to disqualify the Government's evidence of the examination and sampling, especially where the field examination was of sites previously identified in joint examinations conducted with the claimant.

Mining Claims: Hearings -- Rules of Practice: Evidence -- Rules of Practice: Government Contests -- Rules of Practice: Hearings

Where the Government refused prior to a hearing on its contest against mining claims to divulge the results of assays and beneficiation tests there was no unfair surprise at the hearing when the contestee failed to request a continuance after the evidence was presented. The failure to make such a request constituted a waiver of the contestee's original objection to proceeding with the hearing before he could examine all of the Government's reports and information on the claims.

Mining Claims: Discovery: Generally -- Mining Claims: Discovery: Geologic Inference

The requirement of a discovery of a valuable mineral deposit is not met by geological inference, the "intrinsic value" of

the minerals sampled, proximity to patented claims, or delay in contesting the claims; instead, there must be a showing of sufficient mineral so that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine.

Mining Claims: Discovery: Generally

To verify whether a discovery of a valuable mineral deposit has been made, Government mineral examiners need not explore or sample beyond those areas which have been exposed by the claimant; they do not do the discovery work for the claimant and do not need to drill to prove or disprove the existence of minerals at depth where the claimant has not done so.

Mining Claims: Discovery: Generally -- Mining Claims: Patent

Inability of a mining claimant to make the necessary capital investment to establish the existence of a discovery of a valuable mineral deposit is not an excuse or substitute for failure of the claimant to prove the existence of the deposit in order to be entitled to a patent for a mining claim.

APPEARANCES: H. A. Bolinger, Esq., of Bolinger & Wellcome, Bozeman, Montana, for appellant; Robert W. Parker, Esq., Office of General Counsel, United States Department of Agriculture, Missoula, Montana.

OPINION BY MRS. THOMPSON

This appeal on behalf of E. Roy Grigg (hereafter referred to as "contestee" or "appellant") arises from the decision of an Administrative Law Judge 1/, dated March 29, 1971, invalidating the Joyanna, Granite Mountain No. 4, Surprise, and Perfect Day lode mining claims and the Granite Mountain Placer mining claim. These claims lie within the Beaverhead National Forest, in unsurveyed sections 16 and 17, T. 3 S., R. 3 W., P.M., Madison County, Montana.

This proceeding was initiated by a contest complaint filed in behalf of the Forest Service, United States Department of Agriculture, against the five claims. The complaint was served on the contestee April 4, 1970. It charged a lack of discovery of valuable mineral on any of the claims, the absence of a discovery of a lode or vein bearing valuable minerals on the Surprise and Granite Mountain No. 4 claims, and a misorientation of boundary lines of the Joyanna and Perfect Day lode claims.

1/ The change of title of the hearing officer from "Hearing Examiner" to "Administrative Law Judge" was effectuated pursuant to order of the Civil Service Commission, 37 F.R. 16787 (August 19, 1972).

The Administrative Law Judge concluded that the contestee had not discovered a valuable mineral deposit within any of the five claims, and that therefore it was unnecessary to consider the remaining issues. Appellant generally questions the nature and manner of the Government's initiation of this contest, alleges unfair surprise in the evidence, and contends that there has indeed been a discovery sufficient to require patenting of the claims.

Appellant initially asserts that the Government's contest of his claims is contrary to the intent and purposes of the "Multiple Surface Uses Act, 30 U.S.C. § 612 & 613," because the claims are relatively inaccessible and are bordered by patented mining claims, there is general mineralization of the area, and the contest is contrary to the "highest and best use of the land," and the "best interest of the public."

This contest is not a proceeding pursuant to section 5 of the Surface Resources Act of July 23, 1955, as amended, 30 U.S.C. § 613 (1970), but rather was initiated as a contest of mining claims pursuant to 43 CFR 1852 (1970), now codified as 43 CFR 4.451-1. This regulation provides that "[t]he Government may initiate contests for any cause affecting the legality or validity of any entry or settlement or mining claim." These are two distinct procedures with different results, although they are rooted in somewhat similar grounds. The

former procedure is utilized to restrict the claimant's use of surface resources of his mining claim prior to patent, without a final determination as to the validity of the claim, as especially provided for by the Act. Arthur L. Rankin, 73 I.D. 305 (1966). The latter, however, is employed to determine whether a claim is valid or invalid. United States v. Carlile, 67 I.D. 417 (1960). This determination is essential when a claimant raises the issue by filing a patent application, as appellant has done, although the determination may be made in the absence of such an application simply to remove any cloud from the Government's title. The power to initiate a contest "that valid claims may be recognized, invalid ones eliminated, and the rights of the public preserved," requires no specific benefit or designated use by the United States of public lands involved. Davis v. Nelson, 329 F.2d 840, 846 (9th Cir. 1964), citing Cameron v. United States, 252 U.S. 450, 460 (1920). 2/

Appellant avers in this appeal that delay by the Government in contesting his application for patent was unreasonable and prejudicial. He alleges that his advanced age, financial situation, and an alleged loss of evidence prevented him from properly presenting his case. The record shows that his patent application was filed in 1961 (Tr. [transcript page] 14), that a delay of three years was occasioned by an

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2/ Appellant also asserted that the policy of the Forest Service is to contest all applications for patent. It is not within the province of this Board to question such asserted Forest Service policy or practice, but only to determine the merits of the case before us.

adverse claimant's suit (Tr. 35), and that in 1965 another delay occurred when Climax Corporation took an option on the claims, which was only released in the fall of 1967 (Tr. 36). Appellant states that the contested claims are located about timberline at approximately 8,500 feet elevation in a heavy snow area, and he requested on April 30, 1970, that a hearing not be set before July 1st of that year due to the inaccessibility of the claims until the middle of June. The delay in this proceeding is unfortunate, but was occasioned by the foregoing circumstances. There is nothing to substantiate appellant's contention of prejudice because of the delay.

Appellant seeks title to the public lands involved here. He contends that the length of time the claims have been held and the amount of money expended on them should be considered. The requirement of discovery of a valuable mineral deposit is the basis for disposal of the public lands in question here. The Administrative Law Judge correctly stated the law when he referred to the "prudent man rule" as set forth in Castle v. Womble, 19 L.D. 455 (1894); Chrisman v. Miller, 197 U.S. 313, 323 (1905); Cameron v. United States, supra; and Best, et al. v. Humboldt Placer Mining Company, et al., 371 U.S. 334, 335-36 (1963). In this contest proceeding the Government has borne an initial burden of establishing prima facie that the mining claims are invalid, but the contestee has the ultimate burden of proof to show by a preponderance of the evidence, that "* * * a person of ordinary prudence would be justified in the further expenditure

of his labor and means, with a reasonable prospect of success, in developing a valuable mine * * *." Castle v. Womble, supra at 457; Foster v. Seaton, 271 F.2d 836 (D.C. Cir. 1959); United States v. Calla Mortenson, et al., 7 IBLA 123 (1972); United States v. Ray Guthrie, et al., 5 IBLA 303 (1972).

Any delay in contesting this claim cannot serve as a substitute for a valid discovery. Delays may work to the advantage of a mining claimant as much as to the Government. The mere fact claims have been held for many years before a patent application is filed lends no support to a contention the claim is valid, and cannot serve as a substitute for evidence of a discovery. United States v. Harold Dale, A-30465 (January 20, 1966). See also Marvel Mining Co. v. Sinclair Oil and Gas Co., et al., United States v. Marvel Mining Co., 75 I.D. 407, 423 (1968), holding that any initial failure to contest a mining claim when a patent application is filed does not bar further inquiry into the validity of a claim, where on further review of the case, it appears there is no discovery. Unless there is some question of land status involved, such as an intervening withdrawal, necessitating validity of the claim prior to the withdrawal, the validity of a mining claim must be determined at the time the claim is challenged at a hearing. United States v. Estate of Alvis F. Denison, 76 I.D. 233 (1969).

Appellant's next major contention is that the Government's evidence was obtained in secret and introduced as a surprise at the hearing. He alleges that samples were taken without his knowledge, and that assays and laboratory mill tests were made which the Government refused to divulge to him prior to the hearing. Appellant was present in 1961 when Government mineral examiners examined the claims and took samples on each of the five claims (Tr. 35). In 1965 after the adverse suit was dismissed, a further examination was made to update the previous examination (Tr. 36). In 1968 appellant and his son were present during the examination conducted to determine what work the Climax Corporation had done on the claims (Tr. 36). He was not present in 1970 when further examination and sampling were performed by the Government examiners to ascertain whether further work had been done (Tr. 36). We see no prejudice in this case by the failure to notify appellant of the 1970 examination. Appellant did accompany the examiners on two of their inspections. Further inspection was merely to determine if additional work had been done. At the hearing appellant had the opportunity to cross-examine them as witnesses concerning their examination. We believe it is preferable for the Government examiners to notify a contestee before an examination of his claim, but the failure to do so here does not justify any change in the essential determination of discovery. From the number of samples and the methods of testing there is no showing that the Government's sampling was unfair or unrepresentative. Indeed, the extensiveness of the sampling would indicate the opposite.

As for appellant's charge of unfair surprise; i.e., that assays and mill tests were not available prior to the hearing, the record shows that he abandoned this objection. At the beginning of the hearing contestee moved that the Government be required to disclose fully all its assays and information and that the hearing be continued for a year so that the claimant could prepare evidence. The Administrative Law Judge denied this motion but stated:

> I will receive all the evidence of the Forest Service, and the evidence of the contestee, after which I will give consideration to a request from you for additional time in which to meet the Government's evidence (Tr. 7).

The contestee made no such request and instead now alleges that he was unfairly surprised. He has not shown that he has been prejudiced. The decision in this case is based solely on the evidence presented at the hearing. The assays and report of a mill test were introduced into evidence and the mineral examiner who obtained the samples was a witness as to the identity of the samples assayed, the manner in which they were taken, and the locations from which they were obtained. The contestee had the opportunity to cross-examine the witnesses. In any event, he cannot reinstate an allegation of unfair surprise in an appeal to this Board when he failed to request additional time to obviate such surprise after all evidence was presented at the hearing. His failure to make the request

at the conclusion of the hearing, as suggested by the Judge, constitutes a waiver of his original objection. Cf. Foster, et al. v. Seaton, supra, at 837; Adams v. Witmer, 271 F.2d 29, 36 (9th Cir. 1959).

As to his contention that there has been a valid discovery, appellant emphasizes that adjacent claims have been patented and that allegedly valuable ore extends into the contested claims. He asserts that the general mineral geology of the area, the presence of a known fault zone, and the inherent value of the minerals sampled by the Government's witness show that there has been a valid discovery.

We cannot agree. Upon reviewing all of the evidence presented at the hearing we sustain the Judge's findings. It is not essential to discuss the evidence in detail, as the Judge has done so. The adjacent patented claims have not been mined to any extent. In any event, proximity to a discovery on an adjacent claim cannot substitute for a discovery upon the claim itself, nor can deductions from known geological facts where an actual ore body is not exposed, or if exposed, no quantity is shown. United States v. Kenneth O. Watkins and Harold E. L. Barton, A-30659 (October 19, 1967). As the Administrative Law Judge found, two assays introduced by contestee were of samples from claims not involved in this proceeding (Tr. 253), another assay was defective (Exhibit C-13) because no

evidence was presented as to which claim the sample came from, and a tabulation of assays prepared by contestee, which included a sample for the Perfect Day lode claim, was not supported by any evidence which showed how the sample was obtained or where it was taken. While geological inferences may be sufficient to establish the mineral character of an area, there must be a physical exposure within the limits of a claim of a body of mineral of sufficient value to warrant a prudent man to develop a mine. Id. Evidence of the cost of extraction and transportation is considered "as bearing on whether a person of ordinary prudence would be justified in the further expenditure of his labor and means." Converse v. Udall, 399 F.2d 616, 622 (9th Cir. 1968), cert. denied, 393 U.S. 1025 (1969); United States v. Albert B. Bartlett, 78 I.D. 173, 178 (1971). Despite appellant's contentions with respect to certain costs in connection with the mining operation, he did not produce evidence which would establish that the expected returns from the sale of minerals from the claims would be greater than expected costs.

Appellant also contends that assays introduced by the Government were merely of surface samples, and that mineralization of sufficient quantity existed at depth, because "surface value warrants further development at depth." He has shown no evidence that the values do occur at depth. A prudent man "would drill to ascertain

whether values exist at depth. If they do exist he would then proceed to development on the basis of that showing." Henault Mining Company v. Tysk, 419 F.2d 766, 769 (9th Cir. 1969), cert. denied, 398 U.S. 950 (1970). It is not incumbent upon the Government to do the drilling to prove or disprove the existence of minerals at depth where the claimant has not done so. It is well established that Government mineral examiners need not explore or sample beyond those areas which have been exposed by the claimant, as they simply verify whether a discovery has been made. They do not perform the discovery work for the claimant. United States v. Ray Guthrie, et al., 5 IBLA 303 (1972); United States v. Delbert G. Oxford, Dorothy M. Oxford, 4 IBLA 236 (1972); United States v. Herbert H. Mullin, Pearl F. Mullin, C. A. Gussman, 2 IBLA 133 (1971); United States v. Wayne Winters (d/b/a Piedras Del Sol Mining Co.), 2 IBLA 329, 78 I.D. 193 (1971).

Appellant asserts that the land should be patented as its highest and best use is "to consolidate the patented land and protect the patented land against encroachment of outside location" and also to put the land on the tax rolls. He also asserts he has not been able to afford the expense of hiring mining engineers and of having tests performed. These assertions do not establish a basis for issuing a patent. The mining law is not simply a vehicle for transferring federal lands to private owners so that they may consolidate their ownership in an area. Its purpose is to promote

mineral development of the land. The discovery of a valuable mineral deposit provides the incentive for development of a mine and the reward of a patent. Even though expensive capital investment may be necessary for a claimant to establish the fact of discovery, this is no excuse or substitute for failure to prove the existence of the valuable mineral deposit to entitle the claimant to a mineral patent. With respect to a somewhat similar contention concerning the difficulty of making a capital outlay to establish the existence of the minerals at depth, the United States Court of Appeals for the Ninth Circuit has stated in Henault Mining Company v. Tysk, supra:

> * * * It [the mining claimant] wishes, as further incentive, what is tantamount to a guarantee of patentability -- an assurance in advance that win or lose in its search for mineral values it will get its fee title. Public land cannot be dispensed on such a basis. * * *

In short, the reliable evidence in this case showed only insignificant values of gold, silver, molybdenum, tungsten and certain other minerals within some of the claims. The Government established a prima facie case of a lack of discovery. Evidence submitted by the contestee was insufficient to rebut the Government's case and to establish positively that there had been a discovery of a valuable mineral deposit within each claim as necessary to sustain the validity of the claim. We have considered all of appellant's contentions

but must conclude that they afford no reason sufficient to justify any change in the findings and conclusions reached by the Judge below.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Joan B. Thompson, Member

We concur:

Joseph W. Goss, Member

Martin Ritvo, Member.